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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	WT DOCKET NO. 96-4
)	
LIBERTY CABLE CO., INC.	)	File Nos.
	)	708777 (WNTT370)
For Private Operational Fixed Microwave	)	708778, 713296 (WNTM210)
Service Authorization and Modifications	)	708779 (WNTM385)
New York, New York	)	708780 (WNTM555)
	)	708781, 709426, 711937 (WNTM212)
	)	709332 (NEW)
	)	712203 (WNTW782)
	)	712218 (WNTY584)
	)	712219 (WNTY605)
	)	712295 (WNTX889)
	)	713300 (NEW)
	)	717325 (NEW)

To: Administrative Law Judge Richard L. Sippel

OPPOSITION TO MOTION TO ENLARGE ISSUES

Freedom New York, L.L.C. ("Freedom"), by its attorneys, hereby submits its Opposition to the "Motion to Enlarge Issues" ("*Motion*") filed by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner") on April 22, 1996 and the "Supplement to Motion to Enlarge Issues" ("*Supplement*") filed on April 29, 1996 in the above-captioned proceeding. For the reasons outlined below, the *Motion* and *Supplement* provide no support for the relief requested therein, and therefore should be denied.^{1/}

^{1/} Accompanying this Opposition is a "Motion for Limited Intervention" under Section 1.223(b) of the FCC Rules, in which Freedom requests leave to intervene in this proceeding for the limited

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I. INTRODUCTION

The *Motion* and *Supplement* are a strained attempt by Time Warner to force the interjection into this proceeding of a corporate transaction that, while involving a party to this proceeding, has nothing whatsoever to do with the Liberty license applications at issue in the proceeding or the alleged actions by Liberty concerning those licenses.² It is not hard to discern Time Warner's motivation for this attempt: as a result of the asset purchase transaction, the subscribers previously served by Liberty in New York City are now being served by Freedom, a company with increased financial strength and therefore the potential to emerge as a more formidable competitor to Time Warner's franchised cable television services in New York. Simply put, however, Time Warner's attempt to embroil its new, more formidable competitor in this proceeding, which was designated to investigate matters involving license applications filed by a separate company prior to the asset

^{1/} (...continued)

purpose of filing the instant Opposition to Time Warner's *Motion* and *Supplement*. As is apparent from the Motion for Limited Intervention, from this Opposition, and from Time Warner's pleadings themselves, Freedom's interests as the purchaser of certain assets from Liberty Cable Company would clearly be impacted by the allegations raised by Time Warner. Freedom submits that the factual misstatements and unsupported assumptions raised by Time Warner concerning Freedom require specific reply to those misstatements by Freedom. As detailed in Freedom's Motion for Limited Intervention, Freedom has not requested to participate in any other aspect of this hearing, insofar as it involves alleged actions by Liberty that occurred well prior to the acquisition of certain Liberty assets by Freedom.

^{2/} We note that the Hearing Designation Order, FCC 96-85 (March 5, 1996) ("*Designation Order*"), expressly limits the hearing to certain specific license applications that are listed therein. As stated by the Commission: "Because the violations that are the subject of this Order arose in connection with the specific applications referenced above, we will limit the hearing to those applications. We will instruct the Bureau to grant other pending (and future) applications of Liberty . . . conditioned on the outcome of the hearing." *Designation Order*, para. 29. Despite the clear intent of the Commission, Time Warner is now attempting to broaden the hearing to encompass unrelated applications and unrelated parties.

acquisition, must be denied. This proceeding involves the operation of certain microwave facilities that were specifically excluded from the assets purchased in the transaction between Liberty and Freedom. And, notwithstanding Time Warner's unsupported allegations to the contrary, the microwave facilities licensed to Liberty have been at all times, and remain, under the sole ownership and control of Liberty.

II. FREEDOM'S PURCHASE OF CERTAIN ASSETS FROM LIBERTY SPECIFICALLY MAINTAINED LIBERTY'S SOLE OWNERSHIP AND CONTROL OVER THE SUBJECT MICROWAVE AUTHORIZATIONS

On February 20, 1996 Liberty and Freedom entered into an Asset Purchase Agreement pursuant to which Freedom acquired from Liberty certain assets used by Liberty to provide competitive multichannel video distribution services in New York City. More specifically, Freedom acquired Liberty's existing subscriber base in New York City, certain assumed contracts, certain physical property, and certain intellectual property assets, including the use of the name "Liberty." Freedom did not, however, acquire all of Liberty's assets. Most notably for the purpose of this Opposition, Freedom specifically did not acquire the ownership or control of Liberty's operational fixed licenses and related transmission and reception equipment.

It is clear that Time Warner, by relying primarily on newspaper articles as the factual support for its allegations, has misunderstood entirely the nature of the transaction between Freedom and Liberty. Freedom did not acquire Liberty and did not purchase any of Liberty's equity, and has no ownership interest in Liberty and no right to control Liberty. Rather, Freedom purchased certain of the *assets* of Liberty. Liberty, under its new name Bartholdi Cable Co., Inc., continues to exist as an operating company completely separate from Freedom. Surely Time Warner understands the difference between an asset purchase transaction and an equity transaction.

Time Warner makes much of the fact that the transaction between Liberty and Freedom was reported to the U.S. Securities and Exchange Commission in a Form 10-K Annual Report issued by Peter Kiewit Sons' Inc., the ultimate parent company of RCN Corporation, which is the 80.1 percent owner of Freedom, a limited liability company formed for the purpose of owning and operating the assets acquired from Liberty as part of the transaction.^{3/} Clearly, however, Time Warner did not take the time to carefully read the language of the portion of the 10-K that is attached to the *Motion*. The 10-K states that, in March 1996, RCN entered into an "asset purchase agreement, along with other ancillary agreements," to purchase an 80.1 percent interest in "certain private cable systems in New York City and selected areas of New Jersey" (emphasis added). In no way can this language be construed to mean that Liberty itself was purchased by Freedom or that control of Liberty somehow changed hands to Freedom.

Time Warner apparently feels that the language of the 10-K does not speak for itself. For example, on page 5 of the *Motion*, Time Warner speculates as to whether, if a hypothetical transaction between Liberty and Freedom had occurred, certain statements made by Liberty in FCC filings would remain accurate. Specifically, Time Warner surmises that "if Kiewit acquired 80% of Liberty's equity on March 6"(emphasis in the original), the truthfulness of certain statements made by Liberty in STA requests filed in April 1996 might be in issue. But as stated herein and in the 10-K, Kiewit did not acquire any of the equity of Liberty. The speculation of Time Warner

^{3/} As part of the purchase price of the assets, Liberty received a 19.9 percent ownership interest in Freedom.

therefore is completely irrelevant to this proceeding and cannot support the addition of issues concerning a transfer of Liberty to Freedom.^{4/}

Similarly baseless are Time Warner's attempts to show that Freedom somehow acquired the right to control the microwave licenses and related equipment that are the subject of this hearing proceeding. Again, Time Warner's speculation bears no relation to the actual transaction entered into between Freedom and Liberty. Not only did the asset purchase transaction between Freedom and Liberty specifically *exclude* the purchase by Freedom of the microwave licenses and equipment in issue, but Freedom and Liberty also entered into a separate transmission services agreement pursuant to which Liberty provides Freedom with microwave transmission capacity. Liberty provides this service to Freedom as a private carrier using Liberty's FCC licenses and microwave transmission and reception equipment that is owned by Liberty, in return for which Freedom is obligated to pay Liberty a fee for the services rendered. The transmission services agreement specifically provides that Liberty continues to both own and control the FCC authorizations necessary to provide the service, and also that Liberty continues to own and control the necessary transmission and services equipment.

Such an agreement is expressly contemplated by the FCC's rules. *See* 47 C.F.R. 94.17; *see also Amendment of Part 94 of the Commission's Rules and Regulations to Authorize Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service*, PR Docket No. 83-426, 57 R.R.2d 1486 (1985); *Amendment of Part 94 of the Commission's Rules to Permit Private Video*

^{4/} Surely Time Warner's reliance on hearsay (in the form of various newspaper articles) must be dismissed outright in light of the contradiction of those articles by both a filing with the SEC and the statements of the parties to the asset purchase transaction.

Systems of Video Entertainment Access to the 18 GHz Band, 6 FCC Rcd 1270 (1991). Moreover, given Liberty's retention of control over the licensed operations, there has been no assignment or transfer of control of the licenses, and Time Warner does not cite (nor could it cite) any requirement that approval was required to close the asset purchase transaction.^{5/} Indeed, counsel for Liberty and Freedom specifically disclosed the nature of the transmission services agreement, in the context of the related asset purchase transaction, to the Wireless Bureau Staff prior to consummation of the asset purchase agreement and execution of the transmission services agreement. The FCC Staff concurred in the view that FCC approval was not required to consummate the asset purchase transaction because Liberty retains exclusive ownership and control of its FCC licenses.^{6/}

^{5/} Freedom notes that the parties were extremely sensitive to the Commission's assignment and transfer requirements in designing the transaction, and, as indicated by their effort to discuss the structure with the Commission Staff, made sure that the transaction would not constitute any such transfer or assignment. Moreover, the Asset Purchase Agreement specifically recognized that Commission approval would be required in connection with any future assignment of the Liberty licenses and related operations to Freedom or for Freedom to obtain its own licenses to control transmission facilities to replace the services currently being provided to Freedom by Liberty pursuant to the Transmission Services Agreement.

^{6/} Time Warner seems to imply that some sort of FCC approval was required to transfer Liberty's subscribers and other assets to Freedom, irrespective of the continued ownership and operation by Liberty of the FCC licensed facilities. *See Motion*, at p. 7 (requested issue (2): "[t]o determine whether Liberty has misrepresented or concealed facts concerning a transfer of control of its OFS facilities and/or SMATV operation.") (emphasis added). Time Warner does not elaborate, however, on what sort of FCC approval would be required to transfer Liberty's subscribers and other assets, and Freedom knows of no such requirement under the FCC's rules applicable to SMATV operations.

III. FREEDOM IS PROVIDING VIDEO DISTRIBUTION SERVICE TO SUBSCRIBERS IN NEW YORK CITY USING CERTAIN MICROWAVE AUTHORIZATIONS OWNED, OPERATED, AND CONTROLLED BY LIBERTY

Freedom readily admits that it is providing video programming service to certain subscribers in New York City via microwave transmissions, and that certain of those subscribers were formerly Liberty customers whose service was transferred to Freedom pursuant to the asset purchase transaction. Time Warner attempts to imply some violation of the FCC's rules by this manner of service. For example, Time Warner points out, on page 4 of the *Motion*, that the Peter Kiewit Sons' 10-K states that subscription television services are being provided using "microwave frequencies;" Time Warner then goes on to allege that a violation of FCC Rules has occurred because "the *facilities sold* are subject to FCC licensing authority." (emphasis added). Time Warner once again fails to understand the nature of the Freedom transaction. No control of microwave facilities subject to FCC licensing authority was in fact *transferred* to Freedom by Liberty. Therefore no issue of an unauthorized transfer of control of FCC facilities arises.

As discussed above, Freedom subscribers acquired from Liberty are currently being provisioned in part using microwave services that are provided to Freedom by Liberty pursuant to a Transmission Services Agreement. For those subscribers, Freedom is the system operator and Liberty provides transmission services to Freedom. Contrary to Time Warner's unsubstantiated allegations, Freedom has no ownership of, or control over, the microwave authorizations used to serve subscribers pursuant to the Transmission Services Agreement.

IV. FREEDOM ALSO INTENDS TO OBTAIN ITS OWN LICENSES

Freedom's plans for its video distribution system in New York City naturally contemplate the expansion of its operations and service to new subscribers. Therefore, in addition to serving

subscribers via the Transmission Services Agreement with Liberty, Freedom also contemplates the use of, among other distribution channels, *additional* microwave authorizations that will be owned and operated by Freedom. As Time Warner correctly points out in its *Supplement*, Freedom has applied for several new OFS authorizations that, when granted, will be operated and controlled by Freedom. However, the initiation of these new services in no way affects the control and operation of the stations that are currently licensed to Liberty.

Like many telecommunications service providers, Freedom intends to provide service using a combination of transmission services, some of which are owned and some of which it controls, and others of which it purchases from other providers. Certainly, there is nothing unprecedented about using a combination of transmission services in this manner. Once again, however, Time Warner implies that the provision of service using a variety of facilities somehow violates the Commission's rules.

Additionally, while Time Warner admits that the shared use of fixed microwave transmission and reception equipment is expressly permitted under Section 94.19 of the Rules, it nonetheless complains about the applications recently filed by Freedom for new microwave licenses. Time Warner can point to nothing specifically wrong with the applications themselves; therefore, it resorts to complaining that the first license applications filed by Freedom were filed by a law firm that also has filed license applications for Liberty, and that filing fees were paid by a check written under the Liberty name. Neither of these allegations is sufficient to make a persuasive showing that an unauthorized transfer of either Liberty itself or of licensed facilities has occurred. An applicant's choice of counsel is hardly proof of who controls the applicant, let alone a different company. Further, and as previously stated herein, Freedom purchased the use of the Liberty name as part of the asset

purchase transaction, and its use of that name on filing fee checks signifies nothing more sinister than Freedom's use of the asset it purchased.

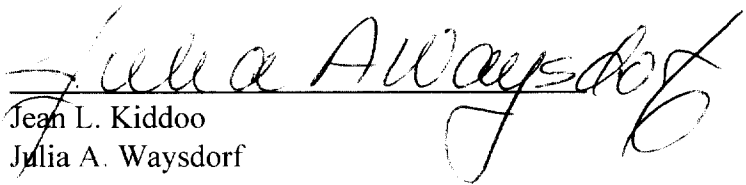
Finally, as a practical matter, Freedom decided that the use of Liberty's FCC licensing counsel for the first few license applications filed after consummation of the transaction would facilitate the licensing process in the interim period when Freedom's counsel and other personnel were engaged in other transition details. Given that the law firm had assisted Liberty in the planning process for those microwave paths prior to the acquisition, it was felt by Freedom and its existing FCC counsel that completion of the filing process by the same firm would better ensure that service could be provided to new subscribers in an expeditious fashion. Now that the transition is complete, that law firm is no longer being used by Freedom for such purposes and, in any event, the implication of Time Warner that the limited use of such counsel in the initial transition period following the consummation of the asset purchase transaction somehow shows that an unauthorized transfer of control took place must be disregarded -- *had* the parties sought to disguise or hide such an occurrence, *surely* the law firm would have been the first thing to be changed.

V. CONCLUSION

Freedom has taken on the formidable task of competing with Time Warner in the New York City video distribution market.^{8/} Freedom intends to compete vigorously and fairly and in full compliance with the rules and policies of this Commission and other regulatory bodies. For the reasons stated herein, Time Warner should not now be permitted to block legitimate competition from Freedom through the interjection into this proceeding of unsubstantiated allegations that implicate Freedom's integrity and that have no bearing on the issues to be decided by the Commission herein.

Respectfully submitted,

FREEDOM NEW YORK, L.L.C.

By: 
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Dated: May 7, 1996

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^{8/} The Commission in the Hearing Designation Order in this proceeding characterized Time Warner as a "monopoly provider" in New York City. Designation Order, para. 22.

DECLARATION

I, Harry Rosenblum, hereby declare and state that the following is true and correct to the best of my knowledge, information and belief:

1. I am the President and Chief Operating Officer of Freedom New York, L.L.C. ("Freedom").

2. In that capacity, I am familiar with the asset purchase transaction entered into between Freedom and Liberty Cable Company, Inc. (now operating under the name Bartholdi Cable Company) ("Liberty"), in which Freedom purchased certain of Liberty's assets. I am also familiar with the ancillary Transmission Services Agreement, dated as of February 20, 1996 between Freedom and Liberty, and with the operation of Freedom's multichannel video distribution system in New York City commencing after the consummation of the asset purchase transaction. Pursuant to that Transmission Services Agreement, microwave transmission services are being provided to Freedom by Liberty, and Freedom is obligated to pay Liberty the fee required.

3. Freedom has not acquired ownership of either Liberty's operational fixed licenses or the related transmission and reception equipment used by Liberty to provide microwave transmission services to Freedom pursuant to the Transmission Services Agreement. Freedom also did not purchase any ownership interest in Liberty itself, and has no control over either Liberty or Liberty's FCC authorizations or the equipment used to provide microwave transmission service under those authorizations.

4. I am also aware of Freedom's plans to apply for its own operational fixed microwave licenses in order to expand its operations and to provide service to new subscribers. Unlike the authorizations that are used by Liberty to provide service to Freedom pursuant to the Transmission

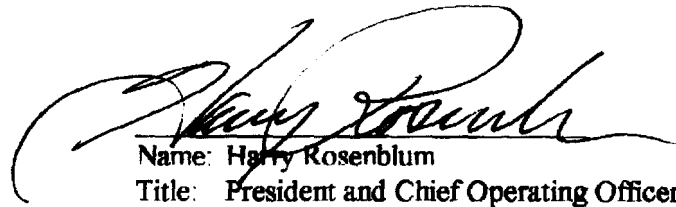
Services Agreement, the new microwave authorizations that Freedom obtains will be owned and controlled by Freedom.

5. The first eight of Freedom's license applications were filed with the Federal Communications Commission ("FCC") on April 11, 1996. While the preliminary engineering and frequency coordination for these applications had been initiated prior to the Freedom purchase of Liberty's assets, the microwave facilities to be constructed pursuant to these licenses subsequent to the closing will implement paths which are not part of the transmission network which is being used by Liberty to deliver transmission services to Freedom. Accordingly, Freedom will be the licensee of these transmission paths upon the Commission's grant of the requested authorizations. Given the Pepper & Corrazini law firm's familiarity with the proposed services as a result of its earlier work on Liberty's behalf, and in order to expedite the licensing process during the interim period in which Freedom's own counsel and other personnel were engaged in other transition matters, Freedom determined to use Pepper & Corrazini to prepare and file, in close consultation with Freedom's existing FCC counsel, the eight applications. To prepare additional new applications to be filed in the near future, Freedom has transitioned its legal work to its pre-existing FCC counsel.

6. I have read the "Opposition to Motion to Enlarge" being filed herewith on behalf and state that the contents thereof are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed May 7, 1996.



Name: Harry Rosenblum
Title: President and Chief Operating Officer
Freedom New York, L.L.C.

CERTIFICATE OF SERVICE

I, Alma R. Myers, a secretary at the law firm of Swidler & Berlin, Chartered, hereby certify that a copy of the foregoing "Opposition to Motion To Enlarge Issues" was served this 7th day of May, 1996, via first class mail and facsimile, as noted upon the following:

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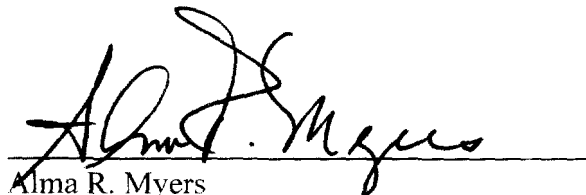
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**Via facsimile and first-class mail